

STATE OF MICHIGAN
BEFORE THE JUDICIAL TENURE COMMISSION

COMPLAINT AGAINST:

HON. DANA FORTINBERRY
Judge, 52nd District Court
Clarkston, MI 48346

FORMAL COMPLAINT NO. 78

DECISION AND RECOMMENDATION OF DISCIPLINE

At a session of the Michigan Judicial
Tenure Commission held on November
21, 2005, in the City of Detroit

PRESENT:

Hon. James C. Kingsley, Chairperson
Hon. Barry M. Grant, Vice Chairperson
Richard D. Simonson, Secretary
Carole Chiamp, Esq.
Hon. Kathleen J. McCann
Hon. Jeanne Stempien
Hon. Michael Talbot
Thomas J. Ryan, Esq.
Diane M. Garrison

I. Introduction

The Judicial Tenure Commission of the State of Michigan ("Commission") files this recommendation for discipline against Hon. Dana Fortinberry ("Respondent"), who at all material times was a judge of the 52nd District Court for the City of Clarkston, Oakland County, Michigan. This action is taken pursuant to

the authority of the Commission under Article 6, § 30 of the Michigan Constitution of 1963, as amended, and MCR 9.203.

On May 10, 2005, the Commission issued Formal Complaint No. 78 against Respondent. On May 20, 2005, Respondent filed her answer to the formal complaint. On June 2, 2005, the Supreme Court appointed Hon. Robert A. Benson, retired from the Kent County Circuit Court, as a master to hear evidence and make proposed findings of fact and conclusions of law.

In lieu of proceeding with the formal hearing, the Examiner and Respondent entered into a Settlement Agreement, a copy of which is appended to this Decision and Recommendation as Attachment 1. Based on Respondent's stipulation to certain facts and conclusions of law and her consent to this recommendation, the Commission concludes that Respondent engaged in misconduct contrary to the Michigan Code of Judicial Conduct. The Commission recommends that the Supreme Court publicly censure Respondent.

II. Findings of Fact

The Commission adopts the Stipulated Facts contained in the Settlement Agreement and incorporates them here:

1. Respondent has been a judge of the 52nd District Court, 2nd Division, since January 1, 2003.

2. Kelley Kostin (née Ott), an attorney and former magistrate in the 52nd District Court, is married to Robert Kostin, a local attorney. Mr. Kostin was previously married to Judith Kostin.

3. Judith Kostin died on September 17, 1989, while still married to Robert Kostin.

4. Following a postmortem examination on September 18, 1989, the Oakland County Medical Examiner, Dr. Bill Brooks, specifically determined the cause of death to be carbon monoxide intoxication, and the manner of death to be suicide. Dr. Brooks wrote in his report, which was incorporated into the White Lake Township police report:

“We believe that Judith Kostin, a 46-year-old white female, died as the direct result of carbon monoxide intoxication and that this event was self-inflicted. Scene circumstance investigation was entirely consistent with such an act with a note consisting of a series of entries implying suicidal intent. Apparently this individual was involved in domestic problems. There was no evidence of trauma or of assault upon the body inconsistent with the terminal event. The deceased appeared to be in otherwise good health. Toxicologic examination of body fluids reserved at the time of the autopsy are separately appended. No additional autopsy or postmortem investigation is anticipated by this office at this time.”

5. Kelley Kostin was a candidate for an open seat on the 52nd District Court in the 2004 primary election.

6. Colleen Murphy, who at the time was a magistrate in the 52nd District Court, was a candidate for the same seat as Kelley Kostin.

7. Respondent supported Colleen Murphy for the position of judge of the 52-2 District Court.

8. On July 20, 2004, Respondent sent a five-page letter to Dave Curtis, Vice President of the Oakland County Deputy Sheriff's Association (the "Association"). A copy of the letter is attached at Tab A.

9. The letter concerned the Association's endorsement of Kelley Kostin in the judicial primary for the 52nd District Court.

10. In that letter, Respondent made the following statements:

"There is another factor that your members should know about in evaluating the legitimacy of the endorsement recommended by [Deputies] Hubanks and McClure. I know they could not have informed your members of this issue, because I am certain that the [Oakland County Deputy Sheriffs' Association] would not have endorsed as it did if the facts had been fully explained. These are the facts:

"In 1989, Kelley Ott was a law clerk at Oakland County Circuit Court, and she had a sexual affair with attorney Bob Kostin, who was at that time living in White Lake with his third wife [Judith Kostin]. The previous Mrs. Kostin [Judith Kostin] found out about the affair, and shortly thereafter was found dead at their home. Due to the circumstances of the death, a police investigation was launched, albeit quietly because the then-and-current White Lake Township Police Chief, Ron Stephens, was a neighbor and friend of Bob Kostin. The investigation was inconclusive, and the case was closed as a suicide. Chief Stephens sealed the records of the investigation and they remain sealed to this day. According to another neighbor, Kelley Ott moved into Bob Kostin's home less than a month after Mrs. Kostin's death. Kelley Ott and Bob Kostin married in the mid-1990's.

"The questions raised by these facts are obvious, but the most important question is what such facts say about the moral fiber of Mr.

and Mrs. Kostin. Is this the type of person your members want as a judge? I chose not to publicize the above incident during the 2002 campaign because I wanted to win on my own merits. Colleen Murphy has chosen not to bring it up for the same reason. As law enforcement officers, however, you deserve to know the truth."

11. Respondent asserted as "fact" that:

- a. Kelley Ott (while a law clerk in Oakland County Circuit Court) had a sexual affair with Robert Kostin in 1989, when he was married to another woman (Judith Kostin);
- b. Judith Kostin found out about the affair shortly before she was found dead in her home;
- c. The circumstances of the death launched a police investigation, which was conducted "quietly" as the White Lake Township Police Chief, Ron Stephens, was a neighbor and friend of Grievant;
- d. The police investigation was inconclusive and the case was closed as a suicide. Chief Stephens sealed the records regarding the investigation and they remained sealed to the day Respondent issued the letter; and
- e. A neighbor stated that Kelley Ott had moved into Bob Kostin's house less than a month after his wife's death.

12. If a hearing were held, White Lake Township Police Chief Ronald Stephens would testify that the police investigation regarding the death of Judith Kostin was not done "quietly," and in fact was conducted as a standard investigation by the White Lake Township Police Department.

13. If a hearing were held, White Lake Township Police Chief Ronald Stephens would testify that he and Robert Kostin were not friends or neighbors at the time of the investigation.

14. If a hearing were held, White Lake Township Police Chief Ronald Stephens would testify that no aspect of the police investigation was "sealed" by the White Lake Township Police Department or Chief Stephens.

15. The police investigation into the death of Judy Kostin was not "inconclusive," as there was an official determination that her death resulted from self-inflicted carbon monoxide intoxication.

16. Respondent had no first-hand knowledge of the truth or falsity of the facts stated in paragraphs 12, 13, 14, and 15, above, or of the representations described in subparagraphs 11.c. and 11.d., above.

17. Respondent did not undertake to independently verify the truth or falsity of the representations made in her July 20, 2004, letter.

18. Respondent intended the representations in her July 20, 2004, letter to raise questions regarding the moral fiber of both Robert Kostin and Kelley Ott Kostin.

19. Respondent admits that her conduct was imprudent, and she deeply regrets any resulting embarrassment she may have brought to the judiciary.

III. Standard of Proof

Typically, the standard of proof applicable in judicial disciplinary matters is the preponderance of the evidence standard. *In re Ferrara*, 458 Mich 350, 360; 582 NW2d 817 (1998). An exception to this rule exists when the respondent is

subjected to discipline based on his or her speech, in which case the clear and convincing evidence standard applies. *In re Chmura*, 464 Mich 58, 71-72; 626 NW2d 676 (2001) (“*Chmura II*”). Here, the standard of proof is not of critical importance because Respondent’s stipulation has conclusively established the relevant facts.

IV. Conclusions of Law

A. First Amendment Protections Apply to Judicial Disciplinary Proceedings

This proceeding involves conduct, by Respondent, that constitutes speech. When a state seeks to regulate speech through disciplinary proceedings, it must do so in a manner consistent with the First Amendment. See *id.*; cf. *Gentile v State Bar of Nevada*, 501 US 1030, 1073; 111 S Ct 2720; 115 L Ed 2d 888 (1991).

As an initial matter, we note that Respondent has not violated any provision aimed directly at regulating speech.¹ Therefore, consideration of the overbreadth doctrine, which applies only to statutes specifically aimed at curtailing First Amendment rights, need not be part of our analysis. See *Hastings v Judicial Conference*, 264 US App DC 306; 829 F2d 91, 106 (1987), citing *Broadrick v Oklahoma*, 413 US 601; 93 S Ct 2908; 37 L Ed 2d 839 (1973).

¹ The only provisions set forth in the complaint specifically directed toward the regulation of speech, Cannon 7B(1)(a), (d), apply only to “[a] candidate, including an incumbent judge, for judicial office.” Because Respondent was not a candidate for judicial office, the allegations that Respondent violated Cannon 7B(1)(a) and (d) are not sustainable.

All of the provisions at issue in this proceeding are general misconduct provisions not specifically directed toward the regulation of speech. Thus, we need only determine whether the recommended discipline would violate Respondent's First Amendment rights when applied to the unique facts at hand.

B. The *Chmura* Standard Controls Because the Misconduct at Issue Involved Political Speech

In *In re Chmura*, 461 Mich 517, 532; 608 NW2d 31 (2000) ("*Chmura I*"), the Michigan Supreme Court explained that "[t]o determine the [facial] constitutionality of an ethics rule, we weigh the state's interests against the candidate's First Amendment interest in the kind of speech at issue." The Court observed that speech about a campaign for political office, i.e., "core political speech," is the most important type of speech entitled to the fullest protection under the First Amendment. *Chmura I*, *supra* at 532-533. The Court also observed that the state has a compelling interest in "preserving the integrity of the judiciary." *Id.* at 535. These competing interests required the *Chmura I* Court to strike a balance between the protection of core political speech and the state's interest in regulating the judiciary. Although the present matter requires the Commission to consider the specific application of general misconduct provisions to a unique set of facts—rather than the facial constitutionality of a provision aimed directly at speech—the same competing interests are present.

Central to the holding in *Chmura I*, was the Court's determination that the conduct to be regulated constituted "core political speech," which is entitled to the fullest First Amendment protection. See *Chmura I*, *supra* at 534. The concept of "core political speech" is not limited only to speech made by candidates for political office. Rather than focusing on the identity of the speaker, the determining factor is the subject matter of the speech. The United States Supreme Court has defined core political speech as simply being "speech on public issues." See, e.g., *Boos v Barry*, 485 US 312, 318; 108 S Ct 1157; 99 L Ed 2d 333 (1988); see also *Buckley v Valeo*, 424 US 1, 14; 96 S Ct 612; 46 L Ed 2d 659 (1976) ("Discussions of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution."); *McIntyre v Ohio Elections Comm'n*, 514 US 334; 115 S Ct 1511; 131 L Ed 2d 426 (1995) (holding that speech by non-candidate about political issue constituted core political speech).

In this matter, Respondent's speech was about the qualifications of a candidate for judicial office, apparently made with the intention of persuading at least one person (if not an entire organization) to support a different candidate. Accordingly, Respondent's letter constituted "speech on public issues" and "debate on the qualifications" of a candidate. As such, it was "core political speech"

entitled to the same level of First Amendment protection as the core political speech involved in the *Chmura* decisions.

In striking a balance between the constitutional interest of protecting core political speech and the state's interest in regulating the judiciary in order to preserve its integrity, our Supreme Court observed that false statements are not protected by the First Amendment in the same manner as truthful statements. *Chmura I, supra* at 542, citing *Brown v Hartlage*, 456 US 45, 60; 102 S Ct 1523; 71 L Ed 2d 732 (1982). The Court also rejected, as inappropriate, use of the subjective "actual malice" test. *Chmura I, supra* at 542. Instead, the Court adopted the same objective standard used in other jurisdictions for attorney discipline proceedings arising from a lawyer's criticism of a judge. *Id.* Under this "objective malice" standard, false communication made with knowing or reckless disregard for the truth—even if made during a political campaign—is not entitled to protection against the state's interest in preserving public confidence in the fairness and impartiality of the justice system. *Id.* at 541-544.

C. Application of the *Chmura* Standard to this Matter

In order to be subject to discipline under the *Chmura* standard, political speech by a judge consist of (1) object facts, that are (2) literally false, and made with (3) knowing or reckless disregard for the truth. *Chmura II, supra* at 72-75.

(1) *Objective Facts*

The first question is whether the communication involved objectively factual matters or a statement of opinion containing a false factual connotation. Speech that qualifies as rhetorical hyperbole or pure opinion cannot be labeled “false.” *Chmura II, supra* at 72-73.

Respondent expressly stated as “facts” in her July 20, 2004 letter, that the White Lake Township police investigation was conducted “quietly” and that the Police Chief, Ron Stephens, was a “neighbor and friend” of Robert Kostin. Respondent also stated that the police investigation was “inconclusive” and that the records were “sealed” and “remain sealed.” Although the “quietness” of the police investigation and the nature of the relationship between Mr. Stephens and Mr. Kostin arguably contain some subjective elements, Respondent’s statement that the investigation into Judith Kostin’s death was “inconclusive” is undeniably an objective factual statement because it communicates that the police did not reach a conclusion regarding the cause of Judith Kostin’s death. So too is Respondent’s statement that records were “sealed” and “remain sealed.”

These statements might be deemed inconsequential if considered in a vacuum. When considered in the context of Respondent’s July 20, 2004 letter, however, it is evident that Respondent intended for them to have special significance. Respondent’s factual recitation was expressly offered as factual

support for her conclusion that Mr. and Ms. Kostin's conduct raised questions about their "moral fiber." The implied suggestion is that Judith Kostin's death may not have been a suicide and that Mr. and/or Ms. Kostin may have been somehow involved in a murder. If Respondent meant only to call attention to Mr. and Ms. Kostin's extra-marital affair, and its tragic consequence, she could have done so merely by reporting the affair and the suicide. The apparent purpose of her decision to also relate allegations regarding (i) the quiet nature of the investigation, (ii) the close relationship between Mr. Kostin and the police, (iii) the inconclusive result, and (iv) the sealed records, was to provide a factual basis for a salacious inference, by the reader, that Mr. and/or Ms. Kostin may have been involved in the murder of Judith Kostin.²

(2) *Literal Falsity*

Once it is established that the communication at issue included objectively factual statements, the next question is whether the communication is false. Speech that is literally or substantially true is protected. *Chmura II*, *supra* at 73-75.

² The Commission's decision that Respondent's conduct is sanctionable under the *Chmura* standard is not based on a conclusion that Respondent, in fact, falsely accused Mr. or Mrs. Kostin of a murder or the cover-up of a murder. Instead, the Commission relies on Respondent's objective factual statements about the underlying police investigation. Respondent's apparent goal in making these factual statements (i.e., to suggest that Kelley Kostin or her husband may have been involved in a murder) is offered only to show that Respondent's false statements were not trivial or insubstantial.

Here, Respondent has stipulated that the police investigation into the death of Judith Kostin was *not* “inconclusive,” and that there was “an official determination that [Judith Kostin’s] death resulted from self-inflicted carbon monoxide intoxication.” (Stipulated Facts, ¶ 15). Accordingly, Respondent’s statement in her July 20, 2004 letter that the police investigation was “inconclusive” was literally false.

Respondent has also stipulated that White Lake Township Police Chief Ronald Stephens would testify, contrary to the statements in Respondent’s letter, that (i) the police investigation was not conducted “quietly,” but rather as a standard investigation, (ii) he and Robert Kostin were not “friends and neighbors” at the time of the investigation, and (iii) no aspect of the police investigation was “sealed.” (Stipulated Facts, ¶¶ 12-14). Therefore, to the extent that the additional representations about the police investigation may be deemed to constitute primarily objective factual statements, they too were false.³

(3) *Reckless Disregard for the Truth*

Finally, once it is determined that the speaker has uttered a false statement about an objective factual matter, the third step is to determine whether the speaker

³ Because Respondent has not offered, or sought to offer, any fact or evidence to controvert Chief Ronald Stephens’s stipulated testimony, we accept his stipulated testimony as a truthful account of the facts.

knew that the statement was false or made the statement with reckless disregard for its truth or falsity. *Chmura II, supra* at 75.

Here, Respondent has stipulated that she had no first-hand knowledge of the truth or falsity of the facts about the police investigation that she described in her July 20, 2004 letter. (Stipulated Facts, ¶ 16). Respondent has further stipulated that she did not undertake to independently verify the truth or falsity of the representations made in her July 20, 2004 letter. Given (i) the timing of Respondent's letter (fifteen years after the police investigation into Judith Kostin's death), (ii) the serious nature of Respondent's allegations (the implication that Mr. and/or Ms. Kostin committed and/or covered up a murder), and (iii) the intent with which they were made (to influence a judicial election), the Commission concludes that Respondent's act of publicly⁴ making false factual allegations about the police investigation, without independent knowledge of their truth, and without

⁴ Although Respondent's allegations were set forth in a letter addressed only to Dave Curtis, Vice President of the Oakland County Deputy Sheriff's Association, her statements were apparently meant for distribution to all members of the Oakland County Deputy Sheriff's Association. This conclusion is evident from the fact that Respondent introduced the story about Judith Kostin's death by saying, "[t]here is another factor that *your members need to know about ...*" (Respondent's July 20, 2004 Letter; emphasis added). Respondent ended the passage about Judith Kostin by concluding that, "[a]s law enforcement *officers, ...* you deserve to know the truth. (*Id.*; emphasis added). Respondent's use of the plural "officers," in combination with her assertion that the entire membership of the Oakland County Deputy Sheriff's Association should know about her factual allegations, shows that she intended a wider audience than merely Dave Curtis.

undertaking any independent effort to verify their truth, constituted a reckless disregard for the truth.

E. The Legal Basis for the Imposition of a Disciplinary Sanction

Pursuant to MCR 9.220(C), Respondent and the Commission have agreed that public censure is the appropriate sanction to be imposed in this case. (Settlement Agreement, ¶ 10). Having determined that Respondent's recklessly false allegations about the police investigation into Judith Kostin's death are not entitled to First Amendment protection under the *Chmura* standard, we now address why Respondent's conduct provides a valid basis for discipline under the law applicable to judges. In particular we focus on Canons 1 and 2 of the Michigan Code of Judicial Conduct, as set forth in the formal complaint.

Canon 1 requires a judge to "personally" observe "high standards of conduct so that the integrity and independence of the judiciary may be preserved." The purpose of Canon 1, and the entire Michigan Code of Judicial Conduct further the objective of an "independent and honorable judiciary." See Canon 1.

Canon 2A requires a judge to "avoid all impropriety and appearances of impropriety" to ensure that [p]ublic confidence in the judiciary" is not "eroded by irresponsible or improper conduct by judges."

Canon 2B requires a judge to “conduct” him or herself in a manner which would “promote public confidence in the integrity and impartiality of the judiciary.”

We conclude that Respondent failed to live up to the high standard of conduct expected of Michigan’s judges when she irresponsibly suggested, without any first-hand knowledge or basis in fact, that Robert Kostin and Kelley Kostin (a candidate for judicial office) were involved in the murder of Robert Kostin’s first wife, Judith Kostin. As noted, this conduct is sanctionable under the First Amendment because Respondent sought to accomplish her desired end by making false statements about the White Lake Township police investigation, which officially determined that Judith Kostin’s death was a suicide. The impropriety of Respondent’s conduct is compounded by the fact that Respondent made the false statements within a letter designed to influence the outcome of a judicial election. In the Commission’s view, Respondent’s act of recklessly publishing false statements about the nature and results of a police investigation in an attempt to disparage a candidate for public office was improper and irresponsible conduct of a nature sufficient to erode the public’s confidence in the honor and integrity of the judiciary. Not only did Respondent’s comments tend to erode public confidence in her own honor and integrity as a judge, but they also tended to erode public confidence in the honor and integrity of then-candidate (and now fellow judge)

Kelley Kostin, and in the White Lake Police Department. Accordingly, we find that Respondent violated Canons 1 and 2 of the Michigan Code of Judicial Conduct.

V. Disciplinary Analysis

A. The *Brown* Factors

The Michigan Supreme Court set forth the criteria for assessing proposed sanctions in *In re Brown*, 461 Mich 1291, 1292-1293; 625 NW2d 744 (1999). A discussion of the relevant factors follows.

(1) *Misconduct that is part of a pattern or practice is more serious than an isolated instance of misconduct.*

The stipulated facts reveal no evidence of a pattern of misconduct in this case.

(2) *Misconduct on the bench is usually more serious than the same misconduct off the bench.*

Respondent's misconduct occurred off the bench. That does not mean, however, that it is not serious. Without taking any action to verify the truth of her statements, Respondent published facts suggesting that two individuals, including one candidate for judicial office, may have been involved in the murder of a third person, even though the death was officially determined to be a suicide.

- (3) *Misconduct that is prejudicial to the actual administration of justice is more serious than misconduct that is prejudicial only to the appearance of propriety.*

The stipulated facts reveal no evidence of misconduct directly prejudicial to the actual administration of justice.

- (4) *Misconduct that does not implicate the actual administration of justice, or its appearance of impropriety, is less serious than misconduct that does.*

Although Respondent's misconduct was not directly prejudicial to the actual administration of justice, her misconduct did implicate the appearance of impropriety with respect to the administration of justice because she disregarded the official determination of the criminal justice system when she suggested that Judith Kostin's death was not a suicide. Others who appear before Respondent may question her actions in cases which involve allegations of murder, particularly where there is also a possibility of suicide. More generally, Respondent's willingness to publicly make false statements without independent knowledge of the truth or any effort to independently verify the truth suggests a recklessness that may undermine public confidence in Respondent's ability to assess evidence and reliably make findings of fact. Finally, Respondent's comments cast aspersions on the police by suggesting that police investigations may be swayed, stopped, or suppressed by persons with connections. Such comments cannot but lead the

public to have contempt for law enforcement officers and the criminal justice system.

- (5) *Misconduct that occurs spontaneously is less serious than misconduct that is premeditated or deliberated.*

Respondent's misconduct appeared in the form of a five-page single-spaced typed letter mailed to Dave Curtis, head of the Oakland County Deputy Sheriff's Association. Respondent's letter obviously required thought and planning; it was not spontaneous, as an oral statement might be.

- (6) *Misconduct that undermines the ability of the justice system to discover the truth of what occurred in a legal controversy, or to reach the most just result in such a case, is more serious than misconduct that merely delays such discovery.*

The stipulated facts reveal no evidence of conduct likely to undermine the ability of the justice system to discover the truth of what occurred in a legal controversy.

- (7) *Misconduct that involves the unequal application of justice on the basis of such considerations as race, color, ethnic background, gender, or religion are more serious than breaches of justice that do not disparage the integrity of the system on the basis of a class of citizenship.*

The stipulated facts reveal no evidence of conduct involving the unequal application of justice on the basis of a class of citizenship.

B. Proportionality

In determining an appropriate sanction in this matter, the Commission is mindful of the Michigan Supreme Court's call for "proportionality" based on

comparable conduct. There appear to be no other matters decided by our Supreme Court in which a judge has been disciplined for suggesting that a death ruled a suicide may actually have been a murder committed, or at least covered up, by a candidate for judicial office.

Based on the facts, the Commission believes that a public censure is a fitting sanction for Respondent's misconduct. Respondent's false statements became known to the public at large through their re-publication in newspaper articles. Respondent's published statements raised implications of foul play and tended to erode public confidence in (i) herself, (ii) a candidate for judicial office who ultimately became a judge, and (iii) the White Lake Township Police Department.

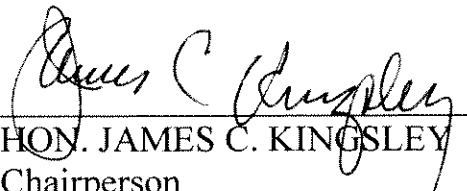
The Commission is mindful that Respondent and now Judge Kelley Kostin appear to have been able to work together amicably and professionally on the 52-2 District Court bench. The Commission commends both of them for being able to put the interests of the public and the institution of the judiciary above any personal rancor they may harbor. The Commission does not want to exacerbate the status quo by recommending that Respondent be suspended, as the consequences of any suspension would have an impact on the administration of justice in Respondent's court. Yet, the Commission would be abandoning its role if it did not recommend a sanction for this conduct. Because Respondent's

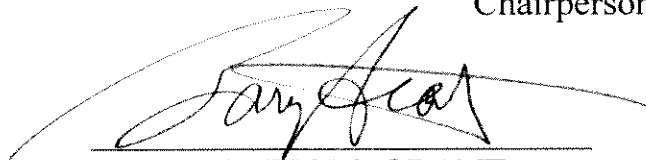
misconduct became public, the judiciary's response should be public as well. Accordingly, the Commission recommends the sanction of public censure.

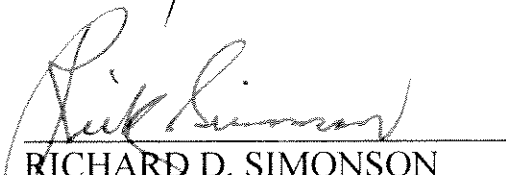
VI. Recommendation

If this Court accepts the Commission's recommendation, it is also recommended that the Court enter an order releasing the master from any further responsibilities in this matter. It is further recommend that, pursuant to the consent of the Respondent, the Michigan Supreme Court enter an order finding judicial misconduct as set forth above, including misconduct in office and conduct prejudicial to the administration of justice, and **PUBLICLY CENSURE** Hon. Dana Fortinberry.

JUDICIAL TENURE COMMISSION

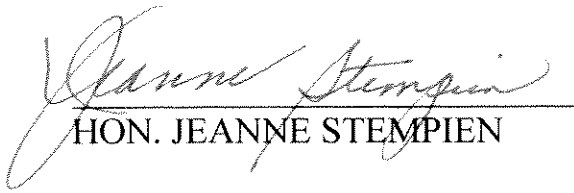

HON. JAMES C. KINGSLEY
Chairperson


HON. BARRY M. GRANT
Vice-Chairperson


RICHARD D. SIMONSON
Secretary


CAROLE CHIAMP, ESQ.


HON. KATHLEEN J. McCANN



HON. JEANNE STEMPIEN



HON. MICHAEL TALBOT



THOMAS J. RYAN, ESQ.



DIANE M. GARRISON

ATTACHMENT 1

STATE OF MICHIGAN
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HON. DANA FORTINBERRY
Judge, 52nd District Court
Clarkston, MI 48346

FORMAL COMPLAINT NO. 78

_____/

SETTLEMENT AGREEMENT

Hon. Dana Fortinberry ("Respondent"), through her attorney, Thomas W. Cranmer, and the Examiner, Paul J. Fischer, (collectively, "the parties") stipulate as follows.

A. PROCEDURAL MATTERS

1. Formal Complaint No. 78 was filed against the Respondent on May 10, 2005.
2. Respondent filed her verified answer to that formal complaint on May 20, 2005.
3. On May 31, 2005, the Supreme Court appointed Hon. Robert A. Benson to act as the master in this matter.
4. This matter is currently scheduled for hearing on the formal complaint on November 28, 2005.
5. The parties have engaged in discussions to resolve this matter.

6. To that end, the parties stipulate the Commission shall decide this matter based on a set of stipulated facts (“Stipulated Facts”), which shall be the sole factual basis for the Commission’s decision and recommendation. The Stipulated Facts are set forth in Section B, below.

7. The parties shall have all other rights and procedures available to them, other than the holding of an evidentiary hearing on the allegations set forth in the formal complaint.

8. The parties hereby knowingly, intentionally, and voluntarily waive their right to:

- a. a hearing before a Master on the issues raised in this matter;
- b. a Master’s Report setting forth findings of fact and/or conclusions of law with respect to the issues raised;
- c. object to those findings before the Commission; a hearing before the Commission on the issues raised in this matter;
- d. a *de novo* review of the factual record by the Commission prior to the Commission’s issuance of its Decision and Recommendation for Order of Discipline;
- e. appear before the Commission and argue regarding the facts and/or potential sanction recommendation;

- f. object to the Commission's Decision and Recommendation in the Michigan Supreme Court;
- g. file briefs in the Michigan Supreme Court in support of her position, unless otherwise ordered by the Court; and
- h. appear before the Supreme Court to argue regarding the facts, law or recommended sanction, unless otherwise ordered by the Court.

9. The parties further stipulate that Respondent will not be assessed costs in this matter.

10. Respondent consents to a sanction of a public censure and this document constitutes her consent to be disciplined pursuant to MCR 9.220(C).

11. The parties agree that the Stipulated Facts are conclusive as to the matters stipulated.

12. The Commission may attach a copy of this Settlement Agreement to its Decision and Recommendation. Until that time, this Settlement Agreement shall be protected by the confidentiality provisions of MCR 9.221.

13. Along with the filing of its Decision and Recommendation in this matter, the Commission may file in the Supreme Court a petition to dismiss the master already appointed.

B. THE STIPULATED FACTS

1. Respondent has been a judge of the 52nd District Court, 2nd Division, since January 1, 2003.

2. Kelley Kostin (*née* Ott), an attorney and former magistrate in the 52nd District Court, is married to Robert Kostin, a local attorney. Mr. Kostin was previously married to Judith Kostin.

3. Judith Kostin died on September 17, 1989, while still married to Robert Kostin.

4. Following a postmortem examination on September 18, 1989, the Oakland County Medical Examiner, Dr. Bill Brooks, specifically determined the cause of death to be carbon monoxide intoxication, and the manner of death to be suicide. Dr. Brooks wrote in his report, which was incorporated into the White Lake Township police report:

“We believe that Judith Kostin, a 46-year-old white female, died as the direct result of carbon monoxide intoxication and that this event was self-inflicted. Scene circumstance investigation was entirely consistent with such an act with a note consisting of a series of entries implying suicidal intent. Apparently this individual was involved in domestic problems. There was no evidence of trauma or of assault upon the body inconsistent with the terminal event. The deceased appeared to be in otherwise good health. Toxicologic examination of body fluids reserved at the time of the autopsy are separately appended. No additional autopsy or postmortem investigation is anticipated by this office at this time.”

5. Kelley Kostin was a candidate for an open seat on the 52nd District Court in the 2004 primary election.

6. Colleen Murphy, who at the time was a magistrate in the 52nd District Court, was a candidate for the same seat as Kelley Kostin.

7. Respondent supported Colleen Murphy for the position of judge of the 52-2 District Court.

8. On July 20, 2004, Respondent sent a five-page letter to Dave Curtis, Vice President of the Oakland County Deputy Sheriff's Association (the "Association"). A copy of the letter is attached at Tab A.

9. The letter concerned the Association's endorsement of Kelley Kostin in the judicial primary for the 52nd District Court.

10. In that letter, Respondent made the following statements:

"There is another factor that your members should know about in evaluating the legitimacy of the endorsement recommended by [Deputies] Hubanks and McClure. I know they could not have informed your members of this issue, because I am certain that the [Oakland County Deputy Sheriffs' Association] would not have endorsed as it did if the facts had been fully explained. These are the facts:

"In 1989, Kelley Ott was a law clerk at Oakland County Circuit Court, and she had a sexual affair with attorney Bob Kostin, who was at that time living in White Lake with his third wife [Judith Kostin]. The previous Mrs. Kostin [Judith Kostin] found out about the affair, and shortly thereafter was found dead at their home. Due to the circumstances of the death, a police investigation was launched, albeit quietly because the then-and-current White Lake Township Police Chief, Ron Stephens, was a neighbor and friend of Bob Kostin. The

investigation was inconclusive, and the case was closed as a suicide. Chief Stephens sealed the records of the investigation and they remained sealed to this day. According to another neighbor, Kelley Ott moved into Bob Kostin's home less than a month after Mrs. Kostin's death. Kelley Ott and Bob Kostin married in the mid-1990's.

"The questions raised by these facts are obvious, but the most important question is what such facts say about the moral fiber of Mr. and Mrs. Kostin. Is this the type of person your members want as a judge? I chose not to publicize the above incident during the 2002 campaign because I wanted to win on my own merits. Colleen Murphy has chosen not to bring it up for the same reason. As law enforcement officers, however, you deserve to know the truth."

11. Respondent asserted as "fact" that:

- a. Kelley Ott (while a law clerk in Oakland County Circuit Court) had a sexual affair with Robert Kostin in 1989, when he was married to another woman (Judith Kostin);
- b. Judith Kostin found out about the affair shortly before she was found dead in her home;
- c. The circumstances of the death launched a police investigation, which was conducted "quietly" as the White Lake Township Police Chief, Ron Stephens, was a neighbor and friend of Grievant;
- d. The police investigation was inconclusive and the case was closed as a suicide. Chief Stephens sealed the records regarding the investigation and they remained sealed to the day Respondent issued the letter; and
- e. A neighbor stated that Kelley Ott had moved into Bob Kostin's house less than a month after his wife's death.

12. If a hearing were held, White Lake Township Police Chief Ronald Stephens would testify that the police investigation regarding the death of Judith Kostin was not done “quietly,” and in fact was conducted as a standard investigation by the White Lake Township Police Department.

13. If a hearing were held, White Lake Township Police Chief Ronald Stephens would testify that he and Robert Kostin were not friends or neighbors at the time of the investigation.

14. If a hearing were held, White Lake Township Police Chief Ronald Stephens would testify that no aspect of the police investigation was “sealed” by the White Lake Township Police Department or Chief Stephens.

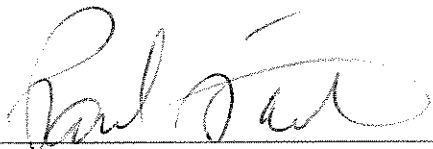
15. The police investigation into the death of Judy Kostin was not “inconclusive,” as there was an official determination that her death resulted from self-inflicted carbon monoxide intoxication.

16. Respondent had no first-hand knowledge of the truth or falsity of the facts stated in paragraphs 12, 13, 14, and 15, above, or of the representations described in subparagraphs 11.c. and 11.d., above.


17. Respondent did not undertake to independently verify the truth or falsity of the representations made in her July 20, 2004, letter.

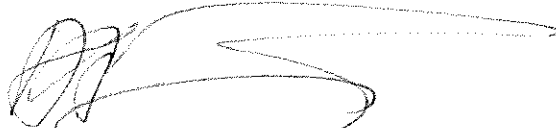
18. Respondent intended the representations in her July 20, 2004, letter to raise questions regarding the moral fiber of both Robert Kostin and Kelley Ott Kostin.

19. Respondent admits that her conduct was imprudent, and she deeply regrets any resulting embarrassment she may have brought to the judiciary.


Paul J. Fischer (P35454)
Examiner
Judicial Tenure Commission
3034 West Grand Blvd., Suite 8-450
Detroit, Michigan 48202

Dated: 11/16/05


Thomas W. Cranmer (P25252)
Attorney for Respondent
Miller, Canfield, Paddock, and Stone, PLC
840 West Long Lake Road, Suite 200
Troy, Michigan 48098


Hon. Dana Fortinberry
Respondent

Dated: 11/8/2005

ATTACHMENT A

July 20, 2004

Dave Curtis
Vice President
Oakland County Deputy Sheriffs' Association
Clarkston, Michigan 48346

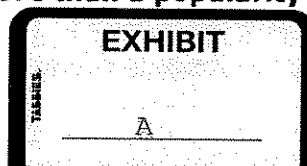
Dear Dave,

I feel compelled to follow up our telephone conversation of today with a letter outlining the reasons for my dismay over the OCDSA's endorsement of Kelley Kostin for 52-2 District Court Judge. I have been in contact for months with both Jim Hubanks and Gary McClure, and was assured by both men that a fair interview process would be conducted prior to any OCDSA endorsement. In recent weeks, I have left numerous messages for Jim Hubanks following up on his promise to schedule an interview for all candidates, and on his promise to allow me to appear before the selection committee to explain my personal endorsement of Magistrate Colleen Murphy for this position. When my messages were not returned, I became concerned about Hubanks' true intentions, and I just last week left him a message reminding him of his promise to conduct a fair interview process. That message, too, received no response.

I feel justified in expressing my concern about the OCDSA endorsement process, since I was endorsed by your organization in 2002 and have fulfilled every promise I made at that time to make the 52-2 District Court a place where law enforcement professionals could count on justice and a level playing field. McNally-Land is no more at the Court, and criminal defendants now know they will face actual punishment for their crimes if convicted. After 22 years of commitment to law enforcement in my legal career, I understand the concerns of your members and I strive each and every day to do everything I can to see that justice at the 52-2 is swift and certain. I assumed that the OCDSA shared that same goal, but now I have grave doubts.

You indicated to me that Hubanks and McClure told your membership that interviews of the candidates had been conducted. One might rightfully ask these two men what personal stake they had in perpetrating such a lie. No interviews ever were conducted, and in fact my personal efforts to effectuate such interviews were rebuffed time and time again.

You also indicated that Hubanks and McClure shared with you the results of the Oakland County Bar Association ratings of judicial candidates, wherein Colleen Murphy was rated "not qualified" and Kelley Kostin rated "well qualified." If any of your membership had read a newspaper in the last week, you'd know that those ratings have been publicly discredited. I personally resigned my OCBA membership as a result of the farce that is the OCBA rating process, but don't just take my word for it. Prosecutor David Gorcyca also wrote a letter to the OCBA president, calling the ratings a "joke" and demanding that the ratings committee to be disbanded. I have been through the OCBA ratings process, Dave, and I can personally attest to the fact that it is nothing more than a popularity contest.



Even assuming that the OCBA's rating were legitimate, however, since when, exactly, has the Deputy Sheriffs' Association taken it's cue from a group made up largely of criminal defense attorneys? Do you think for one minute that these attorneys would give a high rating to a person they knew would set high bonds and who might actually order their clients to jail? If I was a member of your organization, I'd look at the OCBA judicial candidate ratings and then endorse the person whom they rated dead last. I can assure you that the OCBA members, including Kelley Kostin's criminal-defense-attorney husband, would not be the least bit interested in any candidate recommended to them by the OCDSA or any other law enforcement group!

Why did the OCBA rate Colleen Murphy "not qualified"? That's simple. Colleen Murphy has received every single legitimate and fairly-decided police endorsement given in this race so far - the Michigan Association of Police Organizations; POAM; Police Officers Labor Council; Michigan State Police Troopers Association; Michigan State Police Command Officers Association; several FOP local organizations; numerous individual police officers; Clarkston Police Officers Association. I know many of your members have problems with the last agency mentioned, but at least the CPOA's reasons for endorsement were legitimate - they appear every day at the 52-2 District Court and voted to endorse the candidate they know is committed to supporting law enforcement in our community. Those same officers experienced justice at the hands of Judge McNally's hand-picked successor, Kelley Kostin, when she was magistrate at the 52-2, and they didn't like what they saw. Say what you will about Clarkston PD. Those officers at least made a fair comparison and endorsed based upon the safety and security of our community. Can OCDSA now make the same claim?

You may have seen Kelley Kostin's most recent mailer, which claimed endorsements by the Michigan Association of Police and "Fraternal Order of Police." Kostin got the MAP endorsement all right, just as she did in 2002. A single detective in White Lake, who is close friends with the Kostins and a MAP board member, rammed that one through at MAP just as Hubanks and McClure did the OCDSA endorsement - without interviewing any of the other candidates. MAP is, however, but one member of the Michigan Association of Police Organizations, and MAPO has endorsed Colleen Murphy.

Kostin's "Fraternal Order of Police" endorsement is in fact one FOP group, number 132 in Pontiac. Again, that endorsement was rammed through by longtime Kostin friend and the group's legislative chair, Roger Houck. When I cornered Roger prior to the actual endorsement and asked him to commit to me that he would conduct a fair endorsement process, he just grinned at me and walked away. Not all that different from the methods employed by Hubanks and McClure, if you think about it...

Dave, I have been cleaning up Kostin mistakes in files since I took office nineteen months ago. Just when I think I must have seen the last of any files she touched, another one lands on my desk. She was magistrate for six years. You would think that sometime during that tenure she would have figured out that she was not empowered to take pleas on misdemeanors. And I just last week was forced to dismiss a drug delivery case where she, under direction from Judge McNally, chose to issue a "come-in" letter instead of a warrant. When the courthouse burned down on October 31,

1994, that file was destroyed. Since no warrant had been put into the system and the defendant somehow managed not to be arrested again until earlier this year, there was no way to know of the existence of the case until the defendant was arraigned on the new charge nearly ten years later. His attorney made a motion to dismiss based on the speedy trial rule, and I was obliged to grant that motion. That's right, a felony drug charge was dismissed because of procedural error. Such a screw-up would not have happened on my watch, of that you can be sure.

Is that the kind of person you want overseeing the cases your members bring to the 52-2 District Court? I certainly hope not.

I have known Colleen Murphy for twelve years now, and my endorsement of her is based upon my knowledge of her impeccable credentials and her depth of experience in all of the areas pertinent to the position of district court judge. Colleen has a perfect record with the State Bar of Michigan, never having had even so much as one grievance filed against her. She was appointed three years ago by 51st District Judge Phyllis McMillen to serve as a part of that Court's Sobriety Court Team, and continues to serve in that capacity to this day. Judge Batchik and I appointed her magistrate in March 2003 and she has done her job admirably. We receive compliments almost daily about her performance from police officers, attorneys and members of the public who appear before her. Police officers actually request to be scheduled on the days she works because they know they can count on a fair hearing and a decision that is firmly based upon applicable law. Colleen will be able to take the baton passed by Judge Batchik and ensure a seamless transition at the Court. The same cannot be said, unfortunately, of any of the other candidates for this position.

There is another factor that your members should know about in evaluating the legitimacy of the endorsement recommended by Hubanks and McClure. I know they could not have informed your members of this issue, because I am certain that the OCDSA would not have endorsed as it did if the facts had been fully explained. These are the facts:

In 1989, Kelley Ott was a law clerk at Oakland County Circuit Court, and she had a sexual affair with attorney Bob Kostin, who was at that time living in White Lake with his third wife. The previous Mrs. Kostin found out about the affair, and shortly thereafter was found dead at their home. Due to the circumstances of the death, a police investigation was launched, albeit quietly because the then-and-current White Lake Township Police Chief, Ron Stephens, was a neighbor and friend of Bob Kostin. The investigation was inconclusive, and the case was closed as a suicide. Chief Stephens sealed the records of the investigation and they remain sealed to this day. According to another neighbor, Kelley Ott moved into Bob Kostin's home less than a month after Mrs. Kostin's death. Kelley Ott and Bob Kostin married in the mid-1990s.

The questions raised by these facts are obvious, but the most important question is what such facts say about the moral fiber of Mr. and Mrs. Kostin. Is this the type of person your members want as judge? I chose not to publicize the above incident during the 2002 campaign because I wanted to win on my own merits. Colleen Murphy has chosen not to bring it up for the same reason. As law enforcement officers, however, you deserve to know

the truth.

Dave, it is not my place to tell the OCDSA whom to endorse in any political race. I am grateful and honored to have had your organization's endorsement in 2002 and I have worked hard to fulfill the promises I made to your members and to our community since that time. Great strides have been made at the 52-2 District Court and many more are planned. I succeeded in getting a jail transport vehicle and two transport deputies assigned to our court after funding for such a service had been discontinued by the Oakland County Board of Commissioners as a waste of money because [and this is a direct quote] "no one ever went to jail from the 52-2." The County's Facilities and Maintenance Department is, as we speak, in the process of expanding our holding cell area so that a reasonable number of prisoners can be safely accommodated on any given day. Next month, we will complete an 18-month training through the Department of Justice and the Office of Drug Control Policy and will be certified to conduct a Drug & Sobriety Court that will target repeat drug offenders and multiple-offense drunk drivers in an effort to stop the recidivism of these individuals by forcing closely-monitored and swiftly-sanctioned treatment for their addictions. I know I don't have to tell your members that 10% of offenders commit 80% of crimes, and our Sobriety Court will give us a tool to address that specific issue and hopefully lessen the frequency of police officers being dispatched to the same addresses time and time again for alcohol and drug-fueled crimes.

I have targeted young and first-time offenders with strict sentencing for such crimes as MIP, Zero Tolerance OWI and Possession of Marijuana. The days of a \$25 fine and automatic advisement dismissals are gone. Advisements are still awarded to young offenders where appropriate, but every one of those offenders completes a strict period of probation and earns his or her dismissal before it is granted.

As promised, I held our first Court in School day at Clarkston High School this past February and received nothing but positive feedback about the day-long session from students, administrators, parents and other community members. The event was so successful that I'm thrilled to tell you that we have been invited back this fall and will be conducting another Court in School session on October 20, 2004 at the Clarkston High School Performing Arts Center. I hope your members will join us that day and watch the students' eyes grow wider as each case is heard. I received the ultimate compliment when the 16-year-old son of a friend of mine told his Mom, "It was the only time that everyone in an assembly paid attention the whole time!" The only problem we encountered that day was that students were cutting other classes to stay in the auditorium and watch our court session, but CHS Principal Jan Meagher told me that was a problem she could live with all day long.

I have become a participating judge in the Oakland County Prosecutor's Teen Court program, and Teen Court sessions are held at least twice a month at the 52-2 District Court. Both Lakeland and Clarkston High Schools have students in the program, and those students act as attorneys and jurors in deciding on punishment for actual juvenile offenders who have been diverted into the program from Probate/Juvenile Court. I sit as Judge and referee the proceedings, but I get just as much as I give. These students are

amazing and the defendants learn so much when their criminal actions are punished by teens their own age. Again, I urge your members to join us for any of our Teen Court sessions.

Finally, I promised to bring the 52-2 District Court's budget into line and to end the days of million-dollar annual budget deficits funded by law-abiding taxpayers. Not only have we balanced the budget, but we are over \$200,000 ahead of projected revenue right now for our fiscal year. Criminal defendants now pay for the cost of police and court resources utilized as a result of their crimes. As a result of my assessment of court costs and cost recovery fees for police agencies, law abiding citizens no longer subsidize criminals in this jurisdiction.

In short, I made promises to your members in 2002 and I have fulfilled every one of those promises and more. My door always is open to any police agency or officer who has a suggestion as to how we might do things more efficiently, and I have successfully implemented many of the suggestions I have received.

In return, I expected to at least be offered the courtesy of an invitation to express my opinions to the OCDSA prior to its decision about who is best to join me on the bench at the 52-2 District Court. If your members had heard what I had to say and then decided, after a legitimate comparison of candidate qualifications, to endorse someone other than my choice for the office, I would have had absolutely no problem with any such decision. Not only was I not consulted, however, but I was in fact lied to by both Jim Hubanks and Gary McClure in their purposeful efforts to exclude relevant information from the OCDSA's endorsement process. As a judge I am offended by their actions, but as fellow police officers I should think your members would be absolutely outraged.

I hope you will take swift action to publicly rescind the OCDSA's endorsement pending a legitimate fact-finding and interview process. Your members and the voters of this district deserve no less. With the August 3rd primary fast approaching, I cannot emphasize enough that time is of the essence.

As I told you on the telephone, I am available to meet with your Board and/or your membership any time this week before or after work. Feel free to call me at my office or on my cell phone at (248) 240-8682. Thank you for your attention to this most urgent matter.

Very truly yours,

Judge Dana Fortinberry
52-2 District Court